

Social Media in the Workplace:

Examining Implications and Managing Risks



November 8, 2017

31st Annual Governor's EEO Conference

#### Today's Agenda

- •Dangers in relying on social media contents to make employment-related decisions.
- •Scrutiny from employment-related agencies.
- •Discovery and preservation issues.
- Social media best practices.

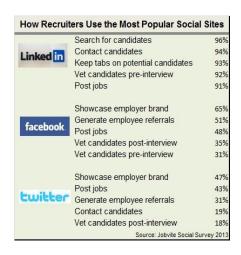


# Social Media Landscape





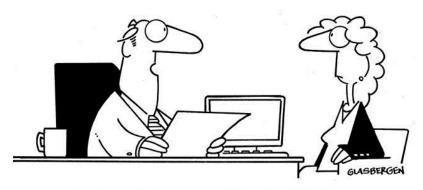
### How are Employers Utilizing Social Media?



- Advertising/promoting business.
- Encouraging employees to use social media to promote the company and enhance business relationships.
- Recruiting/hiring.
- Investigations and terminations of employees.
- · Defense in litigation.

# Recruitment and Hiring.

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"I need your Facebook password before I can hire you. If you're not on Facebook, I need you to join and post a bunch of personal stuff you don't want me to know about."

#### Applicants Are Rejected Based on Social Media Posts

- Lifestyle concerns 58%
- Inappropriate comments and texts 56%
- Unsuitable photos, videos, and information 55%
- Comments or text from friends/ family 43%
- Critical comments related to employment 40%
- Inappropriate comments/text by others 40%
- Membership in certain groups/networks 35%
- Discovering candidate provided false information 30%



# "Ousted mayor makes no apologies for lingerie photos"



#### Applicants Are Accepted Based on Social Media Posts

- Information about the candidate's personality and fit 50%
- Supports of the candidates professional qualifications 39%
- · Good communication skills 35%
- Candidate is well rounded 33%
- Positive references 19%
- Awards or professional recognition 15%



#### Minimizing Risks When Using Social Media in Hiring

- Be consistent
- Job-related criteria only
- · Review by a non-decision maker
- Disclosure to candidate
- · Permission to review



# Social Media Use During Employment Relationship

- Social Media at work:
  - Limit
  - Prohibit
- Social media outside of work
  - · Difficult to control and monitor
  - Develop policies that encourage employees to represent the employer well and in a favorable light



#### Employees Slip Up Often on Social Media After Hire

- "Ding dong the deal is dead! Turns out I won't have to work all week.... Christmas is saved!"
- "First sale is in the books! Thanks XYZ company!"
- "So happy they are finally getting rid of [Sally]! Cannot believe she got away with dating you-know-who for this long!"
- "Enjoying the sun at Thurby! Glad I called in today, so worth skipping work =)"



#### First Amendment Considerations

- Public employers may not restrict their employees' First
   Amendment rights to comment on matters of public concern.
- Courts work to strike a balance between the interests of employees as citizens and the interests of the public agency employer(s) in efficiently providing public services through their employees.



#### Types of Forums

- traditional public forums (e. g. a city park);
- designated public forums (e.g. a government space opened up for public expression);
- limited public forums (e.g. certain government message boards);
- non-public forums (e.g. government-owned spaces not used for expressive purposes, like offices).



#### First Amendment Analysis

- Was the employee speaking as a citizen on a matter of public concern.
  - If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.
  - 2. If the answer is yes, then the possibility of a First Amendment claim arises.
- Does the relevant government entity have an adequate justification for treating the employee differently from any other member of the general public.



#### Matter of 'Public Concern'

- Information shared by the employee helps community members make informed decisions about the operation of their government.
- · Examples -
  - Unlawful conduct by a government employee
  - Illegal activity within a government agency
  - · Misuse of public funds and inefficiency in operating
- Individual personnel disputes and grievances that are not relevant to the evaluating public agency performance are generally not matters of public concern.



#### Risks Resulting from First Amendment Violations

Adverse employment action based on such comments may give rise to claims of

- retaliation
- whistleblower





# Busted by the Boss

----Original Message---From: Kevin Colvin [mailto:
Sent: Wednesday, October 31, 2007 3:55 PM
To: Jill Thompson (North America)
Ce: Paul Davis (North America)
Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,

Kevin

# Busted by the Boss

From: Paul Davis (North America)
Sent: Thursday, November 01, 2007 4:54 PM
To: Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)
Subject: RE:

Kevin,

Thanks for letting us know-hope everything is ok in New York. (cool wand)

Cheers, PCD



# More Pitfalls for Employers

- Sex
- Race
- Date of birth
- Marital status
- Religious views



#### Applicable Statutory Framework

- Title VII of the Civil Rights Act (race, sex, national origin, religion)
- Americans with Disabilities Act
- Age Discrimination in Employment Act (over age 40)
- Executive Order 11246 (protection for federal contractors and federally-assisted construction contractors and subcontracts)



#### Potential Risks for Employers

- Protected legal off-duty activities
- Whistleblower protections
- Stored Communication Act
- Electronic Communications Privacy Act
- Social Media Privacy Acts
- Defamation
- Right to Privacy
- Contextual Deficiencies



#### Fourth Amendment Considerations

- The Fourth Amendment applies "when the Government acts in its capacity as an employer."
- While a warrant is typically required before the government may conduct a search; a warrantless search by a government employer is reasonable if it is conducted for
  - · "a noninvestigatory, work-related purpose" or
  - "investigatio[n] of work-related misconduct;" and
  - if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search."



# What Courts Think about Employers Using Social Media to Make Employment-Related Decisions

- Marshall v. Mayor of Savannah, 366 Fed. Appx. 91 (11th Cir. 2010) – reprimand and, ultimately, termination based on MySpace photos did not violate First Amendment.
- Snyder v. Millersville University, 2008 U.S. Dist. LEXIS 97943 (E.D. PA 2008) – termination based on MySpace pictures did not violate First Amendment.
- Jaszczyszyn v. Advantage Health Physician Network, 504
   Fed. Appx. 440 (6th Cir. 2012) summary judgment based on Facebook pictures affirmed.



#### When Off-Duty Conduct Creeps Into the Workplace

Employers may be liable for claims of hostile work environment even if the alleged harassment occurs off-duty and away from the workplace if the complaining employee "is forced to work for, or in close proximity to, someone who is harassing her outside the workplace." *Duggins ex rel. Duggins v. Steak 'N Shake, Inc.*, 3 Fed. Appx. 302, 311 (6th Cir. 2001).



#### The NLRB & Social Media

- The National Labor Relations Board uses the National Labor Relations Act to protect the rights of employees to act together to address conditions at work. This includes certain work-related conversations on social media.
- The NLRA is not applicable.



#### Avoid Saying this to Employees about Confidentiality:

- "Don't disclose information about other employees."
- · "Don't discuss pending legal matters."
- "Don't talk about the workplace except with your co-workers."
- "You may not make any public communications about the company or its business activities unless you have prior written authorization of the Communications Department."



#### Avoid Saying this to Employees About Being Judicious:

- "You must be sure that your posts are completely accurate and not misleading."
- "When in doubt, do not post."
- "Before you post, check with us [management] to make sure it's a good idea."
- · "Don't pick fights."
- "Avoid discussing topics 'that may be considered objectionable or inflammatory."
- "Don't make disparaging or defamatory comments."



#### **Develop Social Media Policies**

- Address the fundamental issue of your agency's or company's culture and its approach to the use of social media by employees.
- Either embrace and encourage social media, be wary of it, or find a healthy balance between the two.



#### Why Do You Need a Social Media Policy?

- Protect your agency's/ company's trade secrets, confidential, proprietary, and/or privileged information.
- · Protect your agency's/ company's reputation.
- Protect the privacy of other employees.
- Establish guidelines for whether use of social networking sites during work hours is permitted.



#### Considerations for Your Social Media Policy

- Determine how much personal use of social media will be permitted during working hours.
- Reserve the right to monitor employee use of social media while at work or while using company electronic devices.
- · Specify uses of social media that violate the policy.
- Provide a resource for reporting violations.
- · Obtain signed acknowledgments.



#### Monitor and Enforce

- Decide what type of monitoring is needed and who is going to do it.
- · Train your managers and supervisors.
- Be consistent and avoid selective enforcement.
- Keep up with the law, and revise the policy when necessary!



#### **Evidence Preservation**

- Litigants have duty to preserve ESI when party reasonably foresees that evidence may be relevant to issues in litigation.
- Include duty to preserve social media in litigation hold letter.
- After duty to preserve arises, cannot delete or "clean up" social media profiles.



#### Consequences of Failing to Preserve

- Lester v. Allied Concrete Co., 2013 Va. LEXIS 8 (Jan. 10, 2013) – attorney and Plaintif sanctioned by the court.
- Thurmond v. Bowman, 2016 WL 1295957 (W.D.N.Y. Mar. 31, 2016) – Plaintiff's emotional distress claim became subject of evidentiary hearing.
- Gatto v. United Air Lines, 2013 U.S. Dist. LEXIS 41909 (D.N.J. Mar. 25, 2013) – defendants granted adverse inference instruction by the Court because Plaintiff intentionally deactivated his social media account.



# Advising clients on social media accounts

#### If no duty to preserve exists, you can:

- · Take down material from existing sites
- · Use highest privacy and security levels on social media
- Move content from public to private portion of sites where available





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